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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1145

DENDY ROBERT SLIGH, *Petitioner,*

VERSUS

COLUMBIA, NEWBERRY AND LAURENS RAILROAD COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COLUMBIA, NEWBERRY AND LAURENS RAILROAD COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Dendy Robert Sligh, prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Fourth Circuit decided December 23, 1966.

OPINIONS BELOW

The opinion of the District Court is reported at 250 F. Supp. 490 and is printed in the Appendix at pages 9 to 14. The opinion of the Court of Appeals of the Fourth Circuit, No. 10651, is printed in the Appendix at pages 15 and 16.

JURISDICTION

The judgment sought to be reviewed was decided December 23, 1966, and jurisdiction of this Court to review such judgment by writ of certiorari is conferred by 28 USC § 1254 (1) p. 5958 (1964). This Petition is sought pursuant to Chapter 4 of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals improperly interpret the Federal Employers' Liability Act in affirming the District Judge's findings (1) that there was no employer negligence in moving the defendant's railroad motor car with four employees at the time and under the circumstances involved and in failing to assign plaintiff lighter duties; (2) in finding there was no injury or injuries sustained by the plaintiff; and (3) in refusing cross-examination of a witness whose testimony differed from his deposition?

2. Were the findings of fact and conclusions of law of the District Judge against the great weight of the evidence and clearly erroneous in contemplation of the Provisions and Purposes of the Federal Employers' Liability Act.

STATUTES INVOLVED

45 USC § 51, p. 8520 (1964):

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin; dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Rule 43 (b) 28 USC, Appendix p. 6120 (1964) Rules of Civil Procedure:

"SCOPE OF EXAMINATION AND CROSS-EXAMINATION. A Party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or

of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

RULE 26 (d) (1) 28 USC, Appendix p. 6167 (1964) Rules of Civil Procedure:

"Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness."

STATEMENT OF CASE

Plaintiff was a laborer for the defendant railroad with 30 years' experience. On February 7, 1964, his crew was putting in a track across a city street and commenced work one hour earlier than usual. At the close of the day, plaintiff and three other employees were ordered to remove a 2,400 lb. motor car from the railroad tracks. One of the men so designated weighed no more than 155 lbs. and was not in good health, retiring within the year. There were at least eight men available at this time, and the other men moving the motor car were unaccustomed to working with the plaintiff. Plaintiff complained of pains in his back and legs on the journey to his home in defendant's truck, and sought the assistance of a doctor the following morning. He was out of work for one week with a back sprain. On his return to work he was assigned to the most arduous tasks then facing the laborers. His back broke down again, and he was treated intermittently by a general practitioner, and an orthopedic surgeon until the ortheopedic surgeon decided it would be necessary to fuse his spine in order to obtain any relief. Plaintiff is now totally and permanently disabled from engaging in manual labor in the future. The action was originally brought in the United States District Court under the Provisions of the Federal Employers' Lia-

bility Act, conferring jurisdiction upon the District Courts in actions for damages arising out of injuries to employees of railroads engaging in Interstate Commerce.

ARGUMENT

This Petition for a review on writ of certiorari is sought upon the basis that the District Court erred in its findings of fact and conclusions of law and that the Court of Appeals failed to correct such error in its opinion affirming such decision. The District Judge in his Opinion found that there was no negligence, that the Plaintiff was contributorily negligent, that the Plaintiff had suffered no injury, and that the Plaintiff's injuries were not a result of any negligence of the railroad. Plaintiff submits that these findings, and the affirmation by the Court of Appeals, are in conflict with the decisions of this Court in the case of *James C. Rogers v. Missouri Pacific Railroad Co.*, 352 US 500, 77 S. Ct. 443, 1 L.Ed. 2d 493; *Frank E. Meeks v. Georgia, Southern & Florida Railway Co.*, 377 U.S. 405, 84 S.Ct. 1628, 12 L.Ed. 2d 495, and *Blair v. Baltimore & Ohio Railroad Company*, 232 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490. The *Meeks case, supra,* was an action on a writ of certiorari, reviewing and overruling a decision of the Supreme Court of the State of Georgia that an employee was guilty of contributory negligence. In the present case, the District Judge misconstrued the negligence Provisions of the Federal Employers' Liability Act and the decision of this Court in *Rogers v. Missouri Pacific, supra,* that the slightest negligence of the employer is sufficient to sustain an award for damages if such plays any part, however small, in the injury or death complained of. Here, the District Judge found that the Plaintiff "knew his own strength", thereby implying that he exerted too much strength. Yet, he finds that there was no employer neglegence, which finding is, obviously, contradictory. Not only was the defendant railroad negligent in placing four men to move a heavy car, but the supervisors were likewise negligent in assigning such heavy work to the plaintiff immediately

upon his return after the initial injury, thereby aggravating the first injury and necessitating the spinal fusion.

Again, the District Judge found that there was no injury to the plaintiff, despite all of the testimony concerning the obvious condition of the plaintiff and the observations of the other employees as to his physical condition and voiced complaints. While it is true that the District Judge sitting without a jury may "sift" the testimony and accept that which has the greater truth in the case of a conflict, here there is no conflict as to plaintiff's injury and complaints. Both witnesses for the plaintiff and for the defendant testified as to his condition, and as to their observations. Witnesses for the defendant merely testified that they failed to observe any indication of injury.

In view of the testimony as to the heavy weight, the lack of necessary employees, the physical condition of one of the employees, the extremely heavy work assigned to the plaintiff, the observations of his distress, and the resulting disability, confinement, and spinal fusion, the plaintiff submits that the District Judge was clearly erroneous in his findings; both of fact and of the law, and that the Circuit Court was in conflict with and made a significant departure from the decisions of the Supreme Court in affirming such findings.

CONCLUSION

It is, therefore, respectfully submitted that the decision of the District Court was clearly erroneous, that the Circuit Court has decided a Federal question in conflict with the applicable decisions of this Court, and that the writ of certiorari to review should be granted.

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APPENDIX

OPINION OF THE DISTRICT COURT FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an action brought under the Federal Employers' Liability Act, 45 USCA 51, et seq., for injury alleged to have been sustained by the plaintiff as a result of the defendant's negligence. The complaint alleges that defendant is a common carrier by railroad engaged in interstate commerce; that plaintiff is an employee of defendant; that on February 7, 1964, plaintiff was injured when ordered to help move a motor car from defendant's tracks; that defendant's negligence consisted of not providing sufficient employees to move the motor car and of failing to maintain its roadbed so that plaintiff had a safe footing; and that plaintiff suffered a permanent injury to his back.

Defendant's answer admits that it is a common carrier by railroad engaged in interstate commerce; that plaintiff was one of its employees; and that the action is governed by the Federal Employers' Liability Act. The defendant further admits that plaintiff's supervisor instructed him and three other employees to move the motor car, but denies any negligence on its part and denies that plaintiff suffered a permanent injury to this back as alleged. By way of a second defense and in diminution of damages, defendant plead contributory negligence on the part of the plaintiff.

The case was tried before me without a jury. It is the function of the trial judge when a case is tried without a jury to weigh and appraise all of the conflicting testimony, accepting that which is believed and rejecting that which is not believed. *Burgess v. Farrell Lines, Inc.* (CA 4) 335 F. 2d 885 (1964), cert. denied, 379 U. S. 1004.

In compliance with Rule 52(a), Federal Rules of Civil Procedure (28 USCA), I find the facts specially and state my conclusions of law thereon, in the above cause, as follows:

FINDINGS OF FACT

Plaintiff was an extra gang laborer on the defendant railroad and had worked for it since 1934, with a brief interruption in his railroad service in 1944 or 1945. His immediate supervisor or gang foreman was J. E. Sligh.

On February 7, 1964, the defendant was completing the process of converting a spur track at Pinckney Street, Columbia, South Carolina, into a side track. Prior to the conversion, the railroad main line crossed Pinckney Street over a paved crossing. The spur track, coming off the main line at some distance away from Pinckney Street, did not cross or reach Pinckney Street. The railroad was extending the spur track across Pinckney Street and joining it to the main line on the other side of Pinckney Street, thus creating at Pinckney Street two parallel tracks, one being the main line and the other being the side track.

In extending the spur track across Pinckney Street, the railroad had to make a crossing of Pinckney Street, and incident thereto some dirt was graded and moved. In the grading operation, however, the dirt was moved and piled on the side of the spur track away from the main line, and no dirt got on the main line crossing.

Toward the end of the working day on February 7, 1964, the foreman gave an order to remove the motor car, which the men had been using, from the main line. The motor car was on the main line at about the center of the paved crossing over Pinckney Street. The width of the paved crossing was 37.5 feet.

The motor car was nine feet three inches long. The motor of the car is in the front end, and the rear end is the light end. Two parallel bars may be extended from each end of the car and these bars are three feet long when extended. The total weight of the car is 2,430 pounds.

When a motor car is moved, the two parallel bars on the rear (light) end are extended, and four men lift the rear end up (two men at each bar), "walk it around" so its rear wheels are off the tracks, then the motor is activated

and the car is driven under its own power to the place where it is to be parked. The entire motor car is never completely lifted. Occasionally the front bars are extended and members of the crew bear down on these while the other members of the crew lift up on the rear.

A motor car is usually removed with four men as described, and this is a sufficient number. The motor car can be removed with only three men, and occasionally, in an emergency, two men can do the job. The plaintiff had removed this and similar motor cars on many previous occasions, averaging about two or three times a week since 1945.

When the order was given to move the car on February 7, 1964, the car was moved by the plaintiff, C. D. Bouknight, Jessie Lybrand and Sebie Letsy. All of these men had performed this duty many times before. The plaintiff's co-workers exerted their full strength in moving the car. The removal was done with the motor car resting at about the center of the crossing, where the paved surface was free of dirt and debris. The plaintiff had an opportunity to see and was aware of the condition of the track where the motor car was being removed. Plaintiff knew his own strength and capacity. He asked for no additional help. The other men present had other jobs to do, clearing up the site and putting tools away before leaving for the day. None of the men assisting in the lifting observed anything leading them to believe plaintiff suffered an injury when he lifted the motor car. No complaint was made at the time to the foreman, nor did he observe anything wrong with the plaintiff after the moving operation. Nevertheless, the plaintiff visited his personal physician Dr. Sidney E. Carter of Newberry, South Carolina, the next day and complained that he had hurt himself "while lifting rails".

The doctor diagnosed difficulty as an acute back sprain. After conservative treatment plaintiff was permitted to return to work on February 17, 1964. Although he told his foreman he had had trouble with his back he did not request light duty, nor did he report any injury to his

back on the job. On February 17, 1964, he was put on a gondola car unloading cross-ties with two other men and performed other duties. Three men are sufficient for unloading cross-ties. No complaint was made by him to the defendant that his work was too strenous.

On February 20, 1964, plaintiff returned to Dr. Carter, who found about the same symptoms as before and again prescribed conservative treatment. On February 24, 1964, Dr. Carter finding nothing further wrong with the plaintiff sent him to Dr. E. M. Lunceford, an orthopedic surgeon of Columbia, South Carolina.

Dr. Lunceford saw the plaintiff on March 2, 1964, and took x-rays. The x-rays showed a congenital abnormality of the first sacral vertebra. He found that the first sacral vertebra, instead of being rigid and immobile as in a normal man, was movable and acting as a sixth lumbar vertebra. He also found certain roughness or arthritic changes in the articular surfaces. None of this, he said, was referable to any alleged accident of February 7, 1964. The lumbarization of the first sacral vertebra was congenital and the arthritic changes were the result of years of hard work, stress and strain and not the result of anything occurring at any one time.

Dr. Lunceford's diagnosis was essentially the same as that of Dr. Carter, a back sprain, for which he prescribed conservative treatment. The plaintiff responded well and after the third or fourth visit, the muscle spasm and neurological deficit observed earlier disappeared.

On july 28, 1965, almost a year and a half after the alleged injury, Dr. Lunceford performed an operation, correcting the congenital defect and cleaned the arthritic accretions from the articular surfaces. Both of the conditions which the operation corrected pre-existed the alleged injury of February 7, 1964. Dr. Lunceford testified that there is every indication that plaintiff will have optimum recovery from the operation, but because of a back weakness disclosed by the congenital abnormality, plaintiff should not attempt to lift 150-300 pound objects

but that he should be able to lift moderately heavy objects and perform remunerative work.

The defendant railroad was not guilty of negligence as alleged in the complaint or as sought to be shown upon the trial. Adequate, experienced and capable personnel were furnished plaintiff to assist in the removal of the motor car. The place from which the motor car was removed was adequately maintained and clean of dirt and debris. Defendant was not negligent in placing plaintiff on duty when he returned to work on February 17, 1964.

There was no injury to the plaintiff on February 7, 1964, as alleged in the complaint, or on February 17, 1964, as plaintiff sought to establish at the trial.

Even if there had been an injury to plaintiff, as alleged in the complaint or as he sought to prove, no negligence of the defendant played any part, even the slightest, in producing the injury.

The bodily complaints and the medical treatment thereof were not referable to any negligence on the part of the defendant.

CONCLUSIONS OF LAW

Under the Federal Employers' Liability Act "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506 (1957). However, a railroad is not an insurer of the employer's safety, and the bare occurrence of an injury raises no presumption of negligence, without proof of which there can be no recovery. *McCracken v. Richmond, Fredericksburg & Potomac R. Co.*, (CA 4) 240 F. 2d 484 (1957).

As said by the Four Circuit Court of Appeals in the recent case of *Ambold v. Seaboard Air Line Railroad Company*, (CA 4) 345 F. 2d 30, 33 (1965): "While the Rogers case emphasizes the liberal interpretation that must be placed upon the statute, and defines the narrowly limited

area in which the courts are permitted to disturb jury verdicts in cases of this type, we do not understand the decision to relieve the plaintiff from the burden of proving some act of negligence on the part of the railroad.". (Cert. den. 34 LW 3113).

The Third Circuit Court of Appeals refers to the repeated use of the phrase "with reason" in the *Rogers* case, and concludes that the Supreme Court indicated no departure from the normal requirement that the plaintiff, the party with the burden of proof, must "'present probative facts from which the negligence and the casual relation could reasonably be inferred.'" *Dessi v. Pennsylvania Railroad Company*, (CA 3) 251 F. 2d 149, 151 (1958), cert. den. 356 U. S. 967.

Where there is a conflict between the plaintiff's testimony and the testimony of other witnesses called by the plaintiff, this is to be resolved by the trier of the facts. *McCracken v. Richmond, Fredericksburg & Potomac R. Co.*, (CA 4) 240 F. 2d 484 (1957). Where the case is tried before a judge without a jury, the trial judge is the trier of facts and has the function of weighing and appraising the conflicting testimony. *Burgess v. Farrell Lines, Inc.* (CA 4) 335 F. 2d 885 (1964), cert. denied, 379 U. S. 1004.

Applying the foregoing principles of law, the plaintiff has the burden of proving that the defendant was negligent and that such negligence played some part in producing an injury to the plaintiff, and having weighed the testimony and evidence in this case, in my opinion the plaintiff has not sustained his burden of proof.

For the foregoing reasons,

IT IS ORDERED, That judgment be entered for the defendant.

C. C. WYCHE
United States District Judge

Dated:
Spartanburg, South Carolina,
February 14, 1966.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 10,651

DENDY ROBERT SLIGH, *Appeller,*

VERSUS

COLUMBIA, NEWBERRY AND LAURENS RAILROAD COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT COLUMBIA SOUTH CAROLINA

C. C. WYCHE, *District Judge*

PER CURIAM:

Suing under the Federal Employers' Liability Act, 45 USC 51, et seq., Dendy Robert Sligh asked damages from the Columbia, Newberry and Laurens Railroad Company, for injuries he suffered because of the railroad's alleged negligence. The fault charged was the railroad's failure to provide sufficient employees for the job when they were required to raise and move a motor car from the rails. Further neglect, the plaintiff declared, was found in the rail-

road's inadequate maintenance of the track bed which denied the plaintiff-employee a secure footing in this work. In these circumstances the weight of the car, Sligh charges, over-burdened the employees engaged in the movement, causing him severe and permanent back injuries.

The parties stipulated for a trial without a jury, and the District Judge on conflicting evidence found no negligence on the part of the railroad which "played some part in producing an injury to the plaintiff". Judgment for the defendant followed.

From our examination of the record, on Sligh's appeal, we cannot say that these fact findings were "clearly erroneous", F.R.Civ.P. 52(a); nor do we observe error of law in the trial. The judgment of dismissal must stand.

Affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1145

DENDY ROBERT SLIGH, PETITIONER,

versus

COLUMBIA, NEWBERRY AND LAURENS RAILROAD COMPANY, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION

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March 30, 1967.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1145

DENDY ROBERT SLIGH, PETITIONER,

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COLUMBIA, NEWBERRY AND LAURENS RAILROAD COMPANY, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 250 F. Supp. 490 and is reprinted in an appendix to the Petition for Certiorari on page 9. The opinion of the Court of Appeals for the Fourth Circuit is reported at 370 F. (2d) 979 and is reprinted in an appendix to the Petition for Certiorari on page 15.

JURISDICTION

This Court has jurisdiction under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fourth Circuit err in holding that the District Court's findings of fact were not clearly erroneous, where on conflicting evidence the District Court held that there was no negligence on the part of the respondent which played some part in producing an injury to the petitioner?

2. Did the Court of Appeals for the Fourth Circuit err in holding that there was no error of law in the trial, with respect to (1) the handling of the questioning of one of petitioner's witnesses, and (2) the application and interpretation of the Federal Employers' Liability Act, 45 U. S. C., § 51, *et seq.*?

STATUTE AND RULES INVOLVED

The pertinent provision of the Federal Employers' Liability Act, 45 U. S. C., § 51, is set forth at page 3 of the Petition for Certiorari.

Rule 26 (d) (1) and (2), Federal Rules of Civil Procedure, is as follows:

> "(d) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:
>
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
>
> (2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose."

Rule 43 (b), Federal Rules of Civil Procedure, is set forth at page 3 of the Petition for Certiorari.

Rule 46, Federal Rules of Civil Procedure, is as follows:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not hereafter prejudice him."

Rule 52 (a), Federal Rules of Civil Procedure, is as follows:

> "(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interloctuory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b)."

STATEMENT OF THE CASE

[Appendix references in this brief are to appellant's and appellee's appendices filed in the court below, filed in this Court by Petitioner as part of the record pursuant to Supreme Court Rule 21 (3).]

Petitioner, formerly an employee of the respondent railroad, brought suit in the United States District Court for the District of South Carolina against the respondent under the Federal Employers' Liability Act, 45 U. S. C., § 51, *et seq.*, alleging he suffered an injury while assisting in moving a motor car from the railroad tracks. He claimed the railroad was negligent in "failing to provide sufficient employees to move the motor car and in failing to maintain its roadbed so that plaintiff had a safe footing." (Complaint, paragraph 5.) The railroad entered a general denial and alleged contributory negligence in diminution of damages.

The case was tried before the District Court sitting without a jury.

At the trial, the following facts were developed. On February 7, 1964, the petitioner and three other experienced railroad employees moved a motor car from the tracks. The motor car was moved by extending two metal bars three feet long, one from each side of the back end. The back is the light end because the motor is located at the front. (Appellee's Appendix, p. 45.) Two men held each bar, lifted and moved the back (light) end just enough so that the car was at an angle with the tracks. The front (heavy) end of the car was not lifted but remained in place. At no time was the whole car ever lifted. After the back (light) end was shifted clear of the tracks, the motor was activated and the car was driven off the tracks. (Appellee's Appendix, p. 43.) None of the witnesses present saw or heard anything indicating petitioner had injured himself (Appellee's Appendix, pp. 13, 20-21, 22-23, 25, 30,

48, 49 and 51), nor was an injury ever reported. (Appellee's Appendix, pp. 13-14, 45 and 46.)

All of the men who assisted the petitioner had helped move this and similar motor cars many times previously (Appellee's Appendix, pp. 5-6, 19, 21-22 and 25) and had done so with petitioner and each other. (Appellee's Appendix, pp. 14, 19, 22, 24 and 25.) The other men present at the site were busy with their other duties, preparing to leave. (Appellee's Appendix, pp. 31-32 and 49-50.)

The motor car was located on the paved crossing of the main line track, which was free of dirt and debris, away from the area where some grading had taken place. (Appellee's Appendix, pp. 3-5, 11-12, 16-18, 20, 26, 30-31 and 41-43.)

Subsequent to the moving operation, petitioner visited his personal physician, complaining he hurt his back "while lifting rails." (Appellee's Appendix, p. 27.) He was discharged a few days later (Appellee's Appendix, p. 28), returned to work on February 17 and was assigned regular duties. He reported no injury and made no request for light duty. (Appellee's Appendix, pp. 7, 13-14, 15 and 45-47.) Subsequently he again visited his doctor, who, finding no significant change in his condition, referred him to an orthopedic surgeon. (Appellee's Appendix, pp. 28-29.) The orthopedic surgeon found a congenital abnormality and some arthritic accretions around the abnormal joint, but nothing referable to any injury as alleged. (Appellee's Appendix, pp. 35-36 and 37-38.) About a year and a half later, the surgeon operated, correcting the congenital abnormality and cleaning the joint. (Appellee's Appendix, pp. 37-38.)

At the trial the evidence was in conflict, not only between petitioner and respondent's witnesses, but also between petitioner and his own witnesses. On the crucial

issues in the case, petitioner was not supported by any other witness which either he or the respondent called.

On this record, the District Judge, as the trier of facts, found that no negligence of the respondent railroad played any part in producing an injury to the petitioner and entered judgment for the respondent. This was affirmed by the Court of Appeals for the Fourth Circuit, which found that such findings were not "clearly erroneous" under Rule 52 (a), Federal Rules of Civil Procedure, and that there was no error of law.

Petitioner seeks a review of this decision by petition for certiorari under 28 U. S. C., § 1254 (1).

ARGUMENT

The Petition for Certiorari should be denied because the decision below was correct, because there is no conflict of decisions involved and because the case lacks general importance beyond its own facts and these litigants.

I. The Court of Appeals for the Fourth Circuit did not err in holding the District Court's findings were not clearly erroneous.

a. **Applicable law.** Under Rule 52 (a), Federal Rules of Civil Procedure, the findings of fact by a District Court may not be set aside unless "clearly erroneous," that is, unless the reviewing court is left "with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395 (1948). Where there is substantial evidence to support the trial judge's findings, it cannot be said that he was "clearly erroneous." *McAllister v. United States*, 348 U. S. 19 (1954); *Passaro v. Norfolk & W. Rwy. Co.*, 254 F. (2d) 716 (4th Cir. 1958).

In this case the trial judge found for the respondent on conflicting evidence. A review of the record will show,

however, that the only substantial conflict was between the petitioner himself and all the other witnesses who testified, including his own.

Petitioner's complaint alleged two specifications of negligence: insufficient personnel and improperly maintained roadbed.

b. **Claim of insufficient personnel.** Petitioner's claim of insufficient personnel was contradicted by the three men who were helping petitioner move the car (Appellee's Appendix, pp. 20, 21, 23 and 25), by the petitioner's other witnesses (Appellee's Appendix, pp. 8 and 31), and by the respondent's witnesses. (Appellee's Appendix, pp. 44, 47-48, 48-49, 50, 51 and 52). Some of these witnesses testified that four men were the customary and usual number used, some that four men were a sufficient number to use, and some that less than four could be and had been used to remove this and similar motor cars. This claim of insufficient personnel was not substantiated by any witness in the case except petitioner himself.

There was evidence from petitioner's own witnesses that the respondent's foreman did not designate any particular men to move the car. (Appellee's Appendix, pp. 13, 19, 24, 32; Appellant's Appendix, p. 41.) All of the men helping petitioner were experienced employees and had worked together many times before. (Appellee's Appendix, pp. 5-6, 14, 19, 21-22, 24 and 25.) Petitioner's claim that the other men did not, or that one of the men could not, render him adequate assistance was refuted in part by petitioner himself (Appellee's Appendix, p. 5), by the fact that he could not see the other men helping him (Appellee's Appendix, p. 5) and by the testimony of these men (Appellee's Appendix, pp. 20, 22, 25 and 26), all called as petitioner's witnesses. His claim of their unwillingness or inability is not substantiated by any other witness.

The car was empty of tools (Appellee's Appendix, pp. 14 and 23), and respondent's roadmaster, who worked his way up from laborer and had personally moved the car with only one other man, testified that the effective weight being lifted by the four men was only 250-300 pounds. (Appellee's Appendix, p. 44.)

c. **Claim of improperly maintained roadbed.** Petitioner's claim of an improperly maintained roadbed is similarly contradicted by all of his own witnesses. The car was being removed from the paved mainline crossing (Appellee's Appendix, p. 4), and petitioner's three witnesses who testified thereabout said it was in about the middle of the paved crossing. (Appellee's Appendix, pp. 12-13, 20 and 26.)

There was no testimony, other than petitioner's, that the area was improperly maintained or that there was dirt or debris on the crossing for petitioner to step into. On the contrary, petitioner's own witnesses testified that the crossing was clean. (Appellee's Appendix, pp. 12, 20, 26 and 30-31.) This is further substantiated by petitioner's witnesses' testimony that the grading in the vicinity took place away from the paved crossing. (Appellee's Appendix, pp. 11-12, 16-18 and 30-31.) One of respondent's witnesses testified similarly. (Appellee's Appendix, pp. 42-43.)

d. **Claim of failure to assign light duties and later injury.** Petitioner's complaint contained no allegation with reference to alleged failure of the respondent to assign light duties or of any fresh injury or aggravation of a prior injury. Yet at the trial petitioner testified that on February 17, 1964, about ten days after the alleged injury for which be brought suit, he was overworked and sustained some kind of injury. Here again, there is a sharp conflict between petitioner's claims and the balance of the testimony. On cross examination, he himself admitted he made

no request for light duty. (Appellee's Appendix, p. 7.) There is unequivocal testimony that he reported no injury or made any request for light duty. (Appellee's Appendix, pp. 13-14, 15, 23 and 45-47.) He reported back to work for regular duty, having been discharged by his doctor. (Appellee's Appendix, p. 28.)

He described the work to which he was assigned as "our little general work." (Appellant's Appendix, p. 24.) In the work assigned, he was assisting two or three other men unloading cross-ties, and all but the petitioner's own testimony indicates this was a sufficient number to be assigned to that job. (Appellee's Appendix, pp. 15, 24, 31, 46, 49, 50, 51 and 52.) There was ample testimony that he made no complaint that his work was too strenuous and he appeared to be doing his work satisfactorily. (Appellee's Appendix, pp. 23, 26, 48, 50 and 52.)

e. **Medical evidence.** Petitioner failed completely to connect the medical treatment he received with any injury or accident alleged or with any negligence on the part of the respondent. His principal medical expert, an orthopedic surgeon, testified he found basically two conditions: congenital abnormality at the first sacral vertebra and arthritic accretions at the same place. His operation corrected these two conditions. Neither was referable to the alleged accident. (Appellee's Appendix, pp. 35-38.)

After receiving the evidence recited above, the District Court found no negligence on the part of the respondent which played any part in producing any injury as alleged in the complaint or as petitioner sought to establish at the trial. Petitioner's contention that the District Court found no injury is incorrect. He found no injury as alleged in the complaint, *i.e.*, as a result of inadequate assistance in moving the motor car or failure to maintain the roadbed; or as petitioner tried to prove at the trial, *i.e.*, as a result of failure to assign light duty subsequently. This is what

the petitioner had the burden of proving, and the trial judge, as the trier of facts, concluded that he had failed. His conclusion is supported not only by "substantial evidence," but by the overwhelming weight of the evidence. Hence the Court of Appeals did not err in holding that the District Court's findings were not "clearly erroneous."

II. The Court of Appeals for the Fourth Circuit did not err in holding there was no error of law in the trial.

Nor did the Court of Appeals err in holding there was no error of law in the trial. In the Court of Appeals, petitioner's only assignment of error was his claim that the trial judge refused to permit him to cross examine one of his witnesses whose trial testimony supposedly differed from his deposition. This is not argued in the Petition, but it appears as a part of the first of petitioner's question's presented.

Based on the arguments below, the witness involved was J. E. Sligh; he was called by petitioner; he was one of respondent's foremen. Rules 43 (b) and 26 (d) (2) were said to have been violated.

A review of the record (Appellee's Appendix, pp. 9-11; Appellant's Appendix, pp. 33-35), shows that petitioner's counsel did not raise any issue of the witness' unwillingness or hostility or the question of whether he was an officer, director or managing agent. No motion was made to cross examine. Hence, under Rule 46, Federal Rules of Civil Procedure, no opportunity was given the trial judge to rule on petitioner's position, if he objected to any of the judge's actions. *Rossano v. Blue Plate Foods, Inc.*, 314 F. (2d) 174 (5th Cir. 1963), cert. denied, 375 U. S. 866; *American Fidelity & C. Co. v. Drexler*, 220 F. (2d) 930 (5th Cir. 1955); *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F. (2d) 383 (4th Cir. 1939); 5 Moore, *Federal Practice*,

¶46.02, p. 1902. See also *Tyrrell v. District of Columbia,* 243 U. S. 1 (1917).

Even if the question had been raised, the witness does not qualify as a "managing agent" within the meaning of Rules 43 (b) or 26 (d) (2). *Rossano v. Blue Plate Foods, Inc.,* 314 F. (2d) 174 (5th Cir. 1963), cert. denied, 375 U. S. 866; *Hosie v. Chicago and N. W. Rwy. Co.,* 282 F. (2d) 639, (7th Cir. 1960), cert. denied, 365 U. S. 814; *Dowell, Inc., v. Jowers,* 182 F. (2d) 576 (5th Cir 1950). Nor is there anything in the record to show that the witness was unwilling or hostile to the petitioner.

Petitioner's assertion of an issue under Rule 26 (d) (1) was not raised either in the trial court or the Court of Appeals and appears for the first time in the case in the Petition for Certiorari. Hence it is not properly before this Court. *Lawn v. United States,* 355 U. S. 339, 363, n. 16 (1958); *California v. Taylor,* 353 U. S. 553, 557, n. 2 (1957); *Tyrrell v. District of Columbia,* 243 U. S. 1 (1917).

But even apart from the foregoing objections to these issues, there was no error. Petitioner's counsel was given free reign in asking questions. He was permitted to introduce the witness' deposition without opposition. He was permitted freely to contradict the witness, he asked leading questions, and, after initial argument over petitioner's use of the deposition to contradict, which the judge permitted (Appellee's Appendix, p. 10), respondent made no objection to any question petitioner's counsel asked the witness. Hence, petitioner was not prejudiced by the conduct of the trial judge in any event. The Court of Appeals was therefor correct in finding no error of law in the trial.

III. There is no conflict of decisions.

Petitioner asserts that the decision in this case is in conflict with *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), *Meeks v. Georgia Southern & Florida Rwy Co.*, 377 U. S. 405 (1964) and *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600 (1945). But there is no conflict. In each of those cases the trier of facts, on disputed evidence, had found for the plaintiff, and the Supreme Court later granted certiorari, reversed the appellate court's action in setting the verdict aside and reinstated the original verdicts of the triers of fact.

In this case, the trier of facts, on disputed evidence, found for the respondent, and the Court of Appeals affirmed this finding, holding that it was not "clearly erroneous" under Rule 52 (a), Federal Rules of Civil Procedure. In those cases cited by petitioner, the appellate court had either substituted its view of the evidence or erroneously misconstrued the law relating to F. E. L. A. cases. But in this case there has been no substitution by an appellate court of its view of the facts, and there has been no misconstruction of F. E. L. A. law.

The District Court cited the *Rogers* case, 352 U. S. 500 (1957), and recognized that any negligence whatsoever will render a railroad liable for an employee's injury if it played any part at all in producing the injury. But the petitioner failed to prove that the railroad was guilty of any negligence which played any part in producing an injury to the plaintiff. Petitioner's allegations of negligence were not substantiated by any of his witnesses and were explicitly refuted by the petitioner's own witnesses as well as those of the railroad. Hence, the District Judge's finding of no negligence was not only not "clearly erroneous"; it was also a correct finding.

Petitioner hints that an element of contributory negligence defeated his recovery. But the District Court's find-

ings of fact and conclusions of law are not based on contributory negligence but on the absence of railroad negligence.

Petitioner asserts that the District Court misconstrued the provisions of the F. E. L. A., but he does not show wherein this is true. The finding that petitioner knew his own strength is not contradictory to his finding of no employer negligence, but is only an incidental additional finding which, if anything, supports his finding that no employer negligence played any part in any injury to the petitioner.

Although the result in this case is different from the cases claimed to be in conflict, there is in fact no conflict. They are consonant, because in those cases and in this one the findings of fact by the trier of facts have been upheld.

IV. The case lacks general importance.

The District Court recognized the import of the *Rogers* case, 352 U. S. 500 (1957), and made findings of fact in the light of that case. There is no conflict among the circuits nor between this case and a decision of this Court. The issues involved do not present any new issue to this Court. The decision at the trial level was one based solely on the facts, and the findings were not found to be clearly erroneous by the Court of Appeals.

Hence, this case lacks general importance beyond its facts and the litigants involved. It establishes no new precedent, nor does it depart from an old precedent. In reality, since the findings of the trier of fact are supported by overwhelming evidence and there was no error of law in interpreting the F. E. L. A. or in the conduct of the trial, the Court of Appeals' affirmance of the District Court was based upon the decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Certiorari be denied.

Respectfully submitted,

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